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No.

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

RAILROAD COMMISSION OF TEXAS, et al.,
Petitioners,

vs.

MISSOURI PACIFIC RAILROAD, et al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the Fifth Circuit's holding permits private agreements to override governmental regulation of a safety issue.

2. Whether the Federal Railroad Administration (FRA), under the circumstances presented, has found cabooses not to be a safety issue, and impliedly preempted state regulation of cabooses.

3. Whether implied preemption is permissible under 45 U.S.C. § 434, in that the explicit language of § 434 allows states to adopt rail safety regulations "until such time as the Secretary has *adopted* a rule, regulation, order or standard covering the subject matter of such state requirement .... " (Emphasis added).

LIST OF ALL PARTIES

The following parties appeared in the proceedings before the court of appeals:

Missouri Pacific Railroad Company
Southern Pacific Transportation Company
The Atchison, Topeka and Santa Fe Railway Company
Burlington Northern Railroad Company
Missouri-Kansas-Texas Railroad Company
St. Louis-Southwestern Railway Company
Kansas City Southern Railway Company
Louisiana and Arkansas Railway Company

Railroad Commission of Texas and its members
James E. Nugent
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OPINIONS BELOW

The opinion of the court of appeals (Appendix A) is reported at 850 F.2d 264 (1988). The opinion of the United States District Court for the Western District of Texas, Austin Division (Appendix B) is reported at 671 F. Supp.466 (W.D. Tex. 1987)

JURISDICTION

The judgment of the court of appeals was entered on July 29, 1988. No motion for rehearing was filed. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The pertinent provision of the Federal Railroad Safety Act of 1970, 45 U.S.C. § 434 is set forth at Appendix G. The Commission's regulation 16 Tex. Admin. Code § 5.622 is set forth in Appendix C.

STATEMENT OF THE CASE

The railroads brought this action against the Commission seeking to enjoin and invalidate a rail safety regulation promulgated by the Commission requiring cabooses on certain long trains. The railroads complained in the trial court that the state rule (1) was preempted by federal laws and regulations, (2) constituted an unconstitutional burden on interstate commerce, (3) was an unlawful exercise of power by the Commission, and (4) was arbitrary, capricious, and not supported by substantial evidence. The railroads moved for preliminary injunction on the ground of preemption. The Commission's motion to consolidate the

hearing on preliminary injunction with the trial on the merits was granted after the hearing on preliminary injunction. The trial court, by Memorandum Opinion and Order, (App. B) entered its final judgment on various grounds of preemption by federal law and regulation without deciding the burden on commerce claim, unlawful excerise claim, and the arbitrary, capricious and substantial evidence claims. The Commission brought its appeal to the Fifth Circuit pursuant to 28 U.S.C. § 1291. The United States Court of Appeals for the Fifth Circuit affirmed the trial court on the ground that the state's general rule requiring cabooses was impliedly preempted. This was evidenced, the Court said, by certain FRA statements made in a rulemaking proceeding concerning rear-end telemetry devices. 850 F.2d at 267.

STATEMENT OF FACTS

In the summer of 1986, the Commission in two separate dockets promulgated a series of railway safety regulations in response to the 1985 enactment by the Texas Legislature of TEX. REV. CIV. STAT ANN. art. 6448a (Vernon Sup. 1987) which provides:

> The Railroad Commission of Texas is hereby authorized to perform any act and issue any rules or orders as permitted by the Federal Railroad Safety Act of 1970 (45 U.S.C. § 431, *et seq.*).

The first set of rules (16 TEX. ADMIN. CODE §§ 5.616-5.620) which required certain filings, safety equipment, safe walkway areas, and prohibited visual obstructions at grade crossings, was challenged by these same railroads on the same grounds asserted herein in the same lower court. The trial court found all those state rules preempted. *Missouri Pacific Railroad Company v. Railroad Commission of Texas*, 653 F. Supp. 617 (W.D. Tex. 1987). That decision

was reversed and remanded in part, reversed and rendered in part, and affirmed in part at 833 F.2d 570 (5th Cir. 1988) ("MOPAC I'). That same trial court likewise in this case found the Commission's caboose rule wholly preempted.

The caboose rule (App. C), enacted in the Commission's second docket, is divided into 6 subparts, (a)-(f), which are summarized as follows:

1. Sub-part (a) consists of two long sentences. The first sentence requires manned cabooses generally on freight trains in Texas. The second sentence defines or qualifies the applicability of the exceptions in sub-part (d) which permit cabooseless operation on long trains outside railyards.

2. Sub-part (b) requires cabooses to be equipped with an operable radio system which will enable two-way communication between the caboose and the head of the train.

3. Sub-part (c) exempts from the caboose requirement trains under 2000 feet and those operating within railyard limits.

4. Sub-part (d) provides a further exemption for even the long trains if six safety conditions are met.

5. Sub-part (e) permits variances from the caboose rule.

6. Sub-part (f) sets the compliance date at six months after effective date of the rule.

The Fifth Circuit has grounded its decision on implied preemption of the general caboose requirement in the first sentence of sub-part (a).

REASONS FOR GRANTING THE PETITION

I.

THE COURT'S HOLDING RELEGATES REGULATION OF A SAFETY ISSUE TO A PRIVATE AGREEMENT

The Fifth Circuit's opinion permits a private agreement, in the form of collective bargaining, to override governmental regulation of a safety issue. The national impact of this decision is that all state caboose regulation is precluded and superceded by private agreements. Though the court attempts to avoid this conclusion on two slender reeds of reasoning, it cannot.

First, the court finds implied preemption of the state rule based on a statement of the FRA in a proceeding relating to rear-end devices, not cabooses. Second, the court adopts the FRA's open-ended statement that "the lack of a caboose is not a safety issue *per se*" (App. A at 7a, emphasis added) as a finding that the lack of a caboose is *never* a safety issue. Neither reed of reasoning withstands the harsh wind of scrutiny.

A. THE FRA STATEMENT DOES NOT IMPLIEDLY PREEMPT A STATE CABOOSE REQUIREMENT

The FRA consideration cited by the lower court is a 1986 amendment of the FRA's power brake rules to allow a mechanical telemetry device as an alternative to visual observation in brake tests. 51 Fed. Reg. 17300-301 (1986) (App. F). Although several comments received during this FRA rulemaking proceeding concerned the presence or absence of a caboose, a caboose requirement was never

under consideration. Instead, the FRA there recognized that "nothing in any current FRA regulation requires a caboose on any train, nor does anything in the final rule issued in this docket authorize the removal of a caboose." *Id.* at 17300.

The lower court's holding makes the consideration of comments concerning cabooses tantamount to federal action covering the subject matter of the challenged Railroad Commission requirement. This result contradicts the plain meaning of 45 U.S.C. § 434 and misapplies *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 178 (1978). The FRA did not refuse to adopt a caboose rule. No such proposal was before the FRA.

Even if the FRA consideration of comments is conceived to be a pronouncement on the advisability of caboose requirements, there would not have been sufficient federal action to preempt states from adopting caboose rules. While this honorable Court in *Ray* found that a federal agency's failure to adopt a regulation can preempt state regulation, this finding depends upon the particular statute involved. *Id.* at 178, n.28. Each preemption case "turns on the peculiarities and special features of the federal regulatory scheme in question." *City of Burbank v. Lockheed*, 411 U.S. 624 (1973.)[1] The Federal Railroad Safety Act is quite specific on how the Secretary of Transportation, through the FRA, can preempt state regulation: "A state may adopt any law, rule, regulation, order or standard relating to railroad safety until such time as the Secretary *has adopted* a rule, regulation, order, or standard covering the subject matter of such State requirement." 45 U.S.C. § 434;. (Emphasis added).

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[1]*See also Florida Lime and Avacado Growers v. Paul*, 373 U.S. 132, 147 (1963); for the proposition that preemption must be determined within the context of the involved statutory framework.

This Court has further explained how a federal agency may preempt state regulation in *Louisiana Public Service Commission v. FCC*, 476 U.S. 355, 106 S. Ct. 1890 (1986): "the best way of determining whether Congress intended the regulations of an administrative agency to displace state law is to examine the nature and scope of the authority granted by Congress to the agency." A federal agency "may not confer upon itself power. To permit an agency to expand its power in the face of a congressional limitation on its jurisdiction would be to grant to the agency power to override Congress." *Id.* at 1901-02. The FRA can only preempt state regulation by *adopting* a regulation which covers the subject matter of the state regulation. 45 U.S.C. § 434. The FRA's non-adoption of caboose regulations cannot preempt section 5.622. *See Arkansas Electric Co-op v. Arkansas Public Service Commission*, 461 U.S. 375, 385 (1983).

If the FRA intended to preempt state caboose regulation through any of its rulemaking proceedings, it should have said so. "It is appropriate to expect an administrative regulation to declare any intention to preempt state law with some specificity." *California Coastal Commission v. Granite Rock Company*, 480 U.S. 572 (1987), *citing Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 718 (1985). (federal agencies should "make their intentions clear if they intend for their regulations to be exclusive"). Indeed, the FRA itself has clearly and expressly preempted state action in connection with other areas of regulation. For example, concerning alcohol and drug testing, the FRA stated at 50 Fed. Reg. 31569 (1985):

> 11219.13. Preemptive Effect.

> (a) Under section 205 of the Federal Railroad Safety Act of 1970 (45 U.S.C. § 434) issuance of these regulations preempts any state law, rule, regulation, order, or standard covering the same subject matter
> . . . .

No such clear expression of preemption has been made by the FRA concerning cabooses.

The Fifth Circuit relies on the declaration in 45 U.S.C. § 434 that rail safety regulations be nationally uniform to the extent practicable. Section 5.622 simply does not violate the national uniformity concept because no federal regulation covers its subject matter.

Since the Railroad Commission should be held to have authority to adopt a requirement for cabooses on *all* Texas freight trains, the more narrow requirement of 5.622 must certainly be permissible state action under FRSA. Section 5.622 excludes certain train operations from the caboose requirement. First, no train under 2,000 feet in length or operating within railyards is required to have a caboose. Second, a longer train may operate without a caboose so long as none of the named hazardous materials is transported and the train and track are equipped with certain protections. These exclusions are not the subject matter of the rule; the subject matter is, instead, cabooses. The FRSA preemption inquiry should end when it is determined that no federal requirement covers the subject matter of cabooses.

B. The FRA Statement Does Not Preclude Finding That the Use of a Caboose is a Safety Issue

The FRA says, "Moreover, the FRA does not consider the lack of a caboose to be a safety issue per se." (App. F at 70a). Aside from its appearance as an offhand comment in

the background state.. ·:· for an unrelated rule, the literal meaning of the words of the statement is that the lack of a caboose *can be* a safety issue under the proper circumstances. "Per se" means, "by himself or itself; in itself; taken alone; in isolation; unconnected with other matters." *Black's Law Dictionary*, Revised Fourth Edition (1968). The unambiguous meaning of the statement simply does not rise to the level of importance attributed it by the lower court. It is not an unqualified statement that the "FRA ... has determined that the issue does not involve safety." 850 F.2d at 267(App. A, p. 7a)

Here, the Railroad Commission of Texas, in its rulemaking proceeding specifically addressing the issue of cabooses, found that circumstances in Texas make the cabooseless operation of trains particularly hazardous to the public. The Commission was especially concerned because the 1984 statistics before it showed that 22% of the nation's chemical and petroleum product rail tonnage originates in Texas. 11 Tex. Reg. 2974, 2976, June 27, 1986 (App. C at 55a). Hazardous materials accidents in Texas were twice the national average in 1985. *Id.* These materials were being transported in an aging fleet of tank cars which were increasingly privately owned, thus beyond the control of the railroads as to maintenance or rebuilding. *Id.* Based primarily on these concerns, the Commission found a need for the trained eyes and ears of a train crew member in the rear of certain long trains in Texas. The locomotive personnel simply cannot observe the rearward cars of long trains to detect potential problems. The risks to the public were too great for the Commission to permit cabooseless operations for all Texas trains.

The FRA may think that the lack of a caboose is not a safety issue in isolation or unconnected with other matters. But, the Texas agency, after an extensive review of Texas

rail safety concerns, has found that cabooses will promote the public safety in Texas and has chosen to require them in the absence of a federal rule.

C. *Terminal Railroad Association of St. Louis* Rules

The Court of Appeals' reeds of reasoning wither and bend to breaking in the light of this Court's ruling in *Terminal Railroad Association of St. Louis v. Brotherhood of Railroad Trainmen*, 318 U.S. 1 (1943). The lower court's attempt to distinguish the case out of existence must fail. 850 F.2d at 269 n.5 (App. A, p. 9a).

In *Terminal*, this Court flatly upheld a state's right to require cabooses on trains as a function of that state's power to regulate the public health and safety. This holding has never been overturned.[2] The court also found that the caboose requirement did not constitute a burden on interstate commerce even though trains crossed state lines.

It is, however, a third holding of *Terminal* that is the key to the major issue of this case: whether regulation of a safety issue can be relegated to collective bargaining. In *Terminal*, this Court discusses the relationship between labor acts such as the Railway Labor Act and health and safety regulations. 318 U.S. at 6,7. Though sometimes their paths cross, the two types of enactments are directed at very different goals. Labor acts are aimed at promoting the peace and continuity of commerce (318 U.S. at 7) so that management and labor will be able to "cooperate in running the railroad" (*Pennsylvania R. Co. v. United States R. Labor Board*, 261

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[2] *Terminal* is cited with approval as recently as 1985 for the proposition that states have the power to legislate health and safety. *Metropolitan Life Insurance Co. v. Massachusetts*, 471 U.S. 724, 758 n.32 (1985).

U.S. 72, 84 (1923)). Such labor acts are not meant to displace the States' regulation of a "great variety of conditions in transportation and industry, such as sanitary facilities and conditions, safety devices and protections, purity of water supply, fire protection, and innumerable others" (318 U.S. 6,7). The Court states:

> [W]e would hardly be expected to hold that the price of the federal effort to protect the peace and continuity of commerce has been to strike down the state sanitary codes, health regulations, factory inspections, and safety provisions for industry and transportation.

318 U.S. 7.

This reasoning, that collective bargaining should not displace safety standards, is also reflected in the Congressional intent in enactment of the FRSA. Vermont's Senator Winston Prouty, ranking minority member of the Surface Transportation Subcommittee, who had moved to amend an early draft of the bill because "[a]s originally written, the proviso permitting collective bargaining was so broad that it could have undermined the basic goals of this act - " stated:

> Mr. President, I was pleased that the majority of the committee agreed with me and adopted my amendment which encourages collective bargaining for more stringent standards which are not inconsistent with those established by the Secretary of Transportation but at the same time would insure the fact that collective bargaining will not be used as a vehicle for undermining safety standards.

115 Cong. Rec. p. 40205, Dec. 19, 1969. [Emphasis added].

Yet the court below makes no defense of its blatant holding that the matter of cabooses is "affirmatively ... left not to the states but to collective bargaining" (App. A at 7a) beyond its erroneous conclusion that the lack of a caboose is unqualifiedly not a safety issue. Absent this erroneous conclusion, the Court of Appeals' decision must fail.

II.

PREEMPTION UNDER THE FEDERAL RAILROAD SAFETY ACT

The lower court's basic proposition that the Texas rule is impliedly preempted is absolutely contrary to the Congressional history and unambiguous language of the Federal Railroad Safety Act. That act provides, in part, as follows:

> A state may adopt or continue in force any law, rule, regulation, order, or standard relating to railroad safety *until such time as the secretary has adopted* a rule, regulation, order or standard covering the subject matter of such state requirement. A state may adopt or continue in force an additional or more stringent law, rule, regulation, order, or standard relating to railroad safety when necessary to eliminate or reduce an essentially local safety hazard, and when not incompatible with any Federal law, rule, regulation, order or standard, and when not creating an undue burden on interstate commerce.

45 U.S.C. § 434. (Emphasis added).

Thus, state laws or rules are only preempted when the federal government has acted with respect to the same subject matter. The FRSA clearly does not occupy the entire

field of railroad safety. *Mopac I;Southern Pacific Transportation Co. v. Public Utilities Comm'n of California*, 647 F. Supp. 1220 (N.D. Cal. 1986), *aff'd* 820 F.2d 1111 (9th Cir. 1987) (*per curiam*); *Marshall v. Burlington Northern, Inc.*, 720 F.2d 1149, 1153 (9th Cir. 1983); *Norfolk & Western Railway Co. v. Pennsylvania Public Utility Commission*, 413 A.2d 1037, 1041 (Penn. 1980). Under FRSA § 434, there are two instances in which a state may regulate. First, a state may regulate railroad safety until the Secretary of Transportation adopts a rule, regulation, order or standard covering the subject matter of the state regulation. Second, a state may regulate railroad safety where it is necessary to eliminate or alleviate an essentially local safety hazard. The court below has recognized that the Federal Railroad Safety Act leaves states a role to play in rail safety. *Donelon v. New Orleans Terminal Company*, 474 F.2d 1108, 1113 (5th Cir. 1973).

The Secretary of Transportation has not adopted a rule, regulation, order, or standard covering the subject of § 5.622. Because no federal regulation covers this subject matter, it is not necessary for this Court to determine whether the regulation eliminates or alleviates an essentially local safety hazard.

A. CONGRESSIONAL INTENT

The lower court found that Congress merely intended the States to play a "stopgap role" in rail safety regulation until the federal agency could regulate. (App. A at 8a n.3). The court reasoned that this role has diminished with the passage of time since enactment of the FRSA. *Id.* However, this construction is contrary to the language of the act and the debate when it was enacted. The Federal Railroad Safety Act specifically authorizes state regulation of railroad safety at 45 U.S.C. § 434 set out above. During the Congressional

debate on the Federal Railroad Safety Act, then Secretary of Transportation Volpe explained the areas of permissible state jurisdiction over railroad safety as follows:

> *To avoid a lapse in regulation,* Federal or State, after a Federal Safety bill has been passed, section 105 provides that the *states may adopt or continue in force any law, rule, regulation, or standard relating to railroad safety until the Secretary has promulgated a specific rule, regulation, or standard covering the subject matter* of the state requirement. This prevents the mere enactment of a broad authorizing Federal statute from preempting the field and making void the specific rules and regulations of the states. Therefore, until the Secretary has promulgated his own *specific* rules and regulations in these areas, state requirements will remain in effect. This would be so whether such state requirements were in effect *on or after the date of enactment* of the federal statute. [Emphasis added].

Hearings Before the Subcomm. on Transp. and Aeronautics of the Comm. on Interstate and Foreign Commerce on H.R. 7068, H.R. 11417, and H.R. 14478 (and similar bills) S. 1933, 91st Cong. 2d Sess., Ser. No. 91-51, 29 (1970).[3]

Congress was very concerned that states should maintain an effective role in railroad safety regulation; it certainly did not intend to preempt state regulatory authority. Rep. Jake Pickle explained as follows:

> Contrary to some speculation that this version of the Railroad Safety Act cuts across state jurisdiction, *the States can still take action* in three methods. First, the state can continue *and initiate* legislation in areas of

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[3]Section 105 of the Senate bill and section 205 of the House bill are incorporated into 45 U.S.C. § 434.

> safety not covered by Federal regulations ... as an important adjunct, for the first time, the states are clearly given the *power to initiate* legislation in areas which have not been touched by these [federal] regulations and these state legislative efforts will remain in effect unless and until such time that the Federal Government institutes its own regulations. This is an important advance and recognition of state governments.

116 Cong. Rec. 27613 (August 6, 1970).

While it is true that Congress wanted national uniformity in rail safety to the extent practicable, the explicit authorization of state regulation in 45 U.S.C. § 434 was a counterweighing concern to its desire for national uniformity. *See* House Report No. 91-114, U.S. Code Cong. and Admin. News, 91st Cong. (1970) p. 4116 ("House Report") ("[Section 205] provides, however, that until the secretary acts with respect to a particular subject matter, a state may continue to regulate in that area.") The Senate Report contains a similar recognition of State powers:

> On the other hand, the committee recognizes the state concern for railroad safety. Accordingly, this section preserves from Federal preemption two types of State power. First, the States may continue to regulate with respect to that subject matter which is not covered by rules, regulations, or standards issued by the Secretary. All State requirements will remain in effect until preempted by federal action concerning the same subject matter.

No. 91-619, U.S. Code Cong. and Admin. News. 91st Cong. (1969) p. 809 (hereinafter "Senate Report").

The primary purpose of FRSA is to promote safety in all areas of railroad operations. Congress's paramount concern for safety was the reason it enacted the FRSA. House Report, U.S. Code Cong. and Admin. News, pp. 4105-4108; Senate Report, pp. 1-5. Consequently, Congress did not authorize the Federal Railroad Administration to preempt state railroad safety regulations unless there were federal regulations on the same subject matter of state regulations.

This Court has repeatedly refused to void state statutes or regulations, absent congressional intent to preempt them.

> If Congress is authorized to act in a field, it should manifest its intention clearly. It will not be presumed that a federal statute was intended to supersede the exercise of the power of the state unless there is a clear manifestation of intention to do so. The exercise of federal supremacy is not lightly to be presumed.

New York State Dept. of Social Services v. Dublino, 413 U.S. 405, 413 (1973), quoting *Schwartz v. Texas*, 344 U.S. 199, 202-03 (1952). *See also Pacific Gas & Electric v. Energy Resources Commission*, 461 U.S. 190, 206 (1983). Courts are especially reluctant to strike down state regulations when it would leave citizens unprotected while waiting for federal action. *Hillsborough County, Florida v. Auto. Med. Labs*, 471 U.S. 707 (1985); *Kelly v. Washington* 302 U.S. 1, 14-15 (1937). Any doubts as to whether federal regulation of a particular subject matter is the same as state regulation should be resolved in favor of the states. *Chevron U.S.A., Inc. v. Hammond* 726 F.2d 483, 487-88 (9th Cir. 1984), *cert. denied*, 105 S. Ct. 1686 (1985). Where a state's police power is involved, preemption is not to be presumed. *Chrysler Corp. v. Tofany*, 419 F.2d 499, 511 (2nd Cir. 1969); *Chrysler Corp v. Rhodes*, 416 F.2d 319, 324 n.8 (1st Cir. 1969).

III.

THE LOWER COURT'S STATEMENTS ABOUT THE BURDEN ON INTERSTATE COMMERCE AND THE LBIA ARE ERRONEOUS DICTA

The Court of Appeals' ruling in the case at bar is clearly grounded solely on its finding of implied preemption of the general caboose requirement. Thus, the lower court's findings of a burden on interstate commerce and preemption of the exceptions to the general rule under the Locomotive Boiler Inspection Act ("LBIA"), 45 U.S.C.-§ 22 *et seq.*, are wholly unnecessary to the decision. Nevertheless, these findings are erroneous.

The question of whether the Texas caboose requirement constitutes a burden on interstate commerce was never tried in this case. That issue is not a proper subject of judicial notice in a Court of Appeals. Whether a state regulation constitutes an undue burden on commerce is a fact-bound determination. *See Burlington Northorn Railroad Co. v. State of Nebraska*, 802 F.2d 994 (8th Cir. 1986) (remanded for additional evidence on burden on commerce of Nebraska's caboose rule). This Court found Illinois' caboose requirement was not an undue burden on interstate commerce based on the facts of that case. *Terminal Railroad Association v. Brotherhood of Railroad Trainmen*, 318 U.S. 1, 7-9 (1943). The Railroad Commission should not be bound by a finding that the State's rule is a burden on commerce where the facts have not been fully developed. It is insufficient that the lower court finds it "difficult to imagine a state regulation of the train itself ... which could escape being a burden on commerce ...." (App. A at 9a).

The Court of Appeals analysis of the exceptions to the general caboose requirement is likewise flawed. The court holds that these exemptions "standing alone" are preempted by the LBIA because they relate to locomotives in some way. (App.A at 10a). The exemptions, however, do not stand alone, they qualify a general caboose requirement. As exceptions to a valid general rule, the exemptions are permissible even if they would be preempted standing alone. *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 173 (1978). In *Ray*, this Court upheld a provision of a statute requiring a tugboat escort for vessels lacking designated safety features, as follows:

> Given the validity of a general rule prescribing tug escorts for all tankers, Washington is also privileged, insofar as the Supremacy Clause is concerned, to waive the rule for tankers having specified design characteristics.

435 U.S. at 173.

The facts in *Ray* as they relate to tugboat escorts are entirely analogous to those contested in this case. In both *Ray* and this case, an absence of regulation allowed the States to impose their own safety regulations. As an element of those valid regulations, the State did, and was perfectly entitled to, establish the exemptions to those regulations regardless of whether the exemptions standing alone covered previously regulated areas. The lower court committed error in failing to apply this principle.

CONCLUSION

Review by this Court is necessary to correct the Fifth Circuit's erroneous application of implied preemption which permits private agreements to take the place of the state's traditional role in regulating the health, safety, and welfare of its citizens.

Respectfully submitted,

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